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No. 93-1814

In The

# Supreme Court of the United States

October Term, 1993

TANIA FLORES DE BRENES, Individually and as Executor, Administrator or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent; and CLAUDIA CROW, for herself and as Executor, Administrator or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, Decedents,

*Petitioners,*

vs.

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

*Respondents.*

**On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida Third District**

## *AMICUS CURIAE* BRIEF OF THE REPUBLIC OF NICARAGUA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

DANIEL S. PEARSON, ESQ.
(Counsel of Record)

HOLLAND & KNIGHT
701 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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The Republic of Nicaragua, by and through the undersigned counsel, and with the consent of all parties, respectfully submits the following brief *amicus curiae* in support of the petition for writ of certiorari.

## PROCEDURAL HISTORY

In October of 1989, a Boeing 727 aircraft operated by Respondents Transportes Aereos Nacionales, S.A. and Servicio Aereo de Honduras, S.A. (hereinafter collectively referred to as "TAN-SAHSA") crashed in Honduras, resulting in the death of 127 passengers and four crew members. Thirty-four wrongful-death actions – all filed by survivors of Nicaraguan decedents – were filed in the Florida circuit court; thirty-one of them were consolidated for pre-trial purposes. The parties stipulated that Nicaraguan law governed the issue of damages; and TAN-SAHSA stipulated that it would not contest liability for any compensatory damages held to be recoverable under Nicaraguan law. The only question in dispute was whether Nicaraguan law permitted the recovery of moral damages – principally damages for grief and mental anguish of the survivors, identical to the non-economic damages permissible under Florida law – in a wrongful-death case.

After an evidentiary hearing, including testimony for the Petitioners from a former Chief Justice of the Nicaraguan Supreme Court, the Florida trial court held that moral damages are recoverable under Nicaraguan law, and liquidated the damages awardable in the two

above-captioned cases, resulting in the two final judgments which were appealed to the District Court of Appeal of Florida, Third District. The additional 32 cases remain pending in the trial court, and by stipulation will be governed by the disposition of the instant cases.

During the pendency of TAN-SAHSA's appeal to the district court, the Supreme Court of Nicaragua – in a unanimous (9-0) advisory opinion rendered at the request of the Chief District Judge of the Criminal Court in Managua, on behalf of the plaintiffs in the various cases arising from the crash in this case – declared unequivocally that moral damages are recoverable in a wrongful death action under both the Civil Code of Nicaragua and the "quasi-criminal" (tort) provisions of its Criminal Code (App. 12a). In relevant part, the opinion states:

> In Articles 2509, and the subsequent, the Civil Code of Nicaragua establishes civil liability for damages in their entirety, without exclusion. Meaning that it covers property damages as well as moral damages. The law has no provision on damage issues limiting it to property damages exclusively, wherein moral damages are excluded.
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> * * *
>
> The Criminal Code of Nicaragua, in the chapter on Rules to Determine Civil Liability, Article 46, stipulates on the payment of property and moral damages caused by a punishable act [including negligence, under Article 2 of the Criminal Code]. Dependent parties may file claims for property and moral damages pursuant to Articles 46 and 48 Pn.

> Article 10 Pn. indicates that a damaging act or omission of an agent for whose actions a person is responsible, by virtue of a civil relationship binding him/her to such agent, constitutes a quasi crime. Civil liability proceeding from a quasi crime is not annulled as a consequence of a dismissal of the criminal liability of the agent. Said civil liability allows for charges on property and moral damages as well.

Notwithstanding this controlling pronouncement, the Florida district court of appeal accepted unreflexively the defendants' contention that the Nicaraguan Civil Code permits damages only for pecuniary losses, and that the Criminal Code precludes liability for quasi-crimes if the defendant or his agent has been acquitted of criminal charges (App. 1a). The district court's opinion makes no mention of the unanimous Nicaraguan Supreme Court opinion to the contrary on both points; the only passage from the opinion which suggests the court's reasoning is its declaration that "Nicaragua is a civil-law jurisdiction," and "[i]t is axiomatic that in civil-law jurisdictions, law-making is exclusively the function of the legislature" (App. 4a). The Florida court may have concluded that in civil-law jurisdictions, judicial interpretations of legislation are meaningless, and thus that it was not required to pay any attention to the studied conclusion of the Nicaraguan Supreme Court.

Not surprisingly, the district court's decision – and especially its failure even to mention the unanimous Nicaraguan Supreme Court opinion on the precise point at issue – caused considerable consternation in the quarters of government in Nicaragua. The reaction was especially aggressive in light of

the district court's uninformed dismissal of judicial decision-making in civil-law countries. Although the legislature indeed is the primary interpretive authority under the Nicaraguan Constitution, an historical legacy of interpretive Nicaraguan Supreme Court decisions on a question is universally recognized as authoritative precedent; and the Nicaraguan Supreme Court also has unquestioned constitutional authority to summarize or restate a legislative directive, as opposed to interpreting it. Indeed, the very fact and legacy of advisory opinions is an affirmation of that authority. In light of the Florida court's declaration that "in civil-law jurisdictions, lawmaking is exclusively the function of the legislature," it is not surprising that the National Assembly of Nicaragua became the primary focus of the reaction occasioned by the court's decision.

Before the time for rehearing of the Florida court's decision had expired, the National Assembly of the Republic of Nicaragua, pursuant to its express constitutional authority, enacted an interpretive law declaring that moral damages are recoverable and have been recoverable under Nicaraguan law (App. 16a). Under Article 138(2) of the Nicaraguan Constitution, the National Assembly is granted the constitutional power to render an "Authentic Interpretation" of the law of Nicaragua. Such an interpretation, by definition, does not run afoul of the constitutional prohibition against *ex post facto* laws, because it is not a new law, but the interpretation of an existing law. Indeed, the provision of the Civil Code which codifies the *ex post facto* prohibition exempts "laws which are limited to interpreting the meaning of other laws . . . . " Were Nicaraguan law otherwise, there would

be no institution in Nicaragua empowered to interpret the statutory law.

In words which mirror the Nicaraguan Supreme Court's earlier declaration, the interpretive law (App. 16a) declares that "civil responsibility for the damages and harms referred to [in various provisions of the Nicaraguan code] is for damages in their entirety, without exclusion, meaning both material damages and moral damages. There is no provision whatsoever in the law that limits damages strictly to material damages or that excludes moral damages." The National Assembly then proceeded to address each of the relevant legislative provisions misinterpreted by the Florida appellate court, and to explain in detail its unequivocal declaration that moral damages are permitted in the instant cases, notwithstanding the acquittal of the defendants' agents of criminal charges in Honduras. The interpretive law subsequently was signed by the President of Nicaragua, meaning that all three branches of the government agree with it.

Although the Nicaraguan Supreme Court's unanimous opinion alone should have been dispositive of the controversy, the unequivocal declaration of the National Assembly certainly left no room for disagreement on the point at issue before the Florida court. Indeed, it was the Florida court itself which had declared in its opinion that "lawmaking is exclusively the function of the legislature." Nevertheless, the district court of appeal issued an order which denied without explanation the Petitioners' motion for rehearing. The Petitioners subsequently sought review by the Florida Supreme Court, which has only limited constitutional authority to review district court decisions, and which denied review without explanation.

## THE INTEREST OF THE REPUBLIC OF NICARAGUA IN THIS CONTROVERSY

The Florida district court's decision is binding not only on the parties in the two actions which were before it, but also on the plaintiffs in 32 other cases currently pending in the Florida trial court. Those plaintiffs have not to date participated directly in this proceeding, and yet they have suffered not only a deprivation of the substantive rights to which they unquestionably are entitled under the law of their country, but in addition – along with the Petitioners – a deprivation of their fundamental right of due process, which is violated whenever a construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction when such law "has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 (1988). In one sense, the Republic of Nicaragua appears in this Court on behalf of those citizens. In a larger sense, the Republic of Nicaragua stands here for itself, as a member of the community of nations, entitled to the deference for its tradition and its institutions which all nations expect and enjoy. From this perspective, the Florida court's decision not only is a tragic denial of the unquestioned rights of private litigants; it is also an affront to the sovereignty of another nation, and by implication to the sovereignty of all nations.

## SUMMARY OF THE ARGUMENT

The Republic of Nicaragua respectfully submits that the decision of the District Court of Appeal of Florida,

Third District, constitutes a denial of the right of due process of the Petitioners and the other plaintiffs similarly situated, because it declines deference to the unequivocal declarations of all three branches of the government of the Republic of Nicaragua, on a question of Nicaraguan law. In addition, the Republic respectfully submits that the Florida court's decision violates due process because it violates the act of state doctrine, by declaring invalid the official act of a foreign sovereign performed within its own territory.

## ARGUMENT

The Petitioners have demonstrated that the Florida court's analysis of Nicaraguan law (which reflects no independent study of the issue, but instead accepts wholesale the Respondents' selective discussion of the relevant statutes and judicial decisions) is fundamentally erroneous in virtually every respect. In addition, the Florida court's error implicates two fundamental policies of federal law. The first, which is discussed at length in the petition itself, is that, subject to narrow exceptions not applicable here, the federal constitutional guarantee of due process required the Florida court's deference to the superior knowledge of the Nicaraguan government on an issue of Nicaraguan law. Because the declarations of the Nicaraguan Supreme Court and its National Assembly are unambiguous and unequivocal – indeed, both responded specifically to the issue raised in this particular case – the Florida court had no authority to revisit the substantive propriety of those declarations. *See, e.g., United States v. Pink*, 315 U.S. 203, 220-21 (1941) (official

declaration of officer of the Russian government as to the intended extraterritorial effect of a prior Russian decree of nationalization is conclusive on the courts of this country).

Second, because the Nicaraguan Supreme Court decision and the National Assembly's authoritative interpretation both purported to resolve the very point at issue in the instant litigation, the Florida court's action clearly violated due process by violating established priniciples of international comity, including the act of state doctrine, which reflects "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964). As the Court put it in *Oetjen v. Central Leather Co.,* 246 U.S. 297, 304 (1918), *quoting Underhill v. Hernandez,* 168 U.S. 250 (1987): "To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relationship between governments and vex the peace of nations.' " Thus, the doctrine provides that "the act within its own boundaries of one sovereign state- . . . becomes . . . a rule of decision for the courts of this country." *Ricaud v. American Metal Co.,* 246 U.S. 304, 310 (1918). The rule applies "[i]n every case in which . . . the relief sought or the defense interposed would have required a court of the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co. v. Environmental*

*Tectonics Corp., Intl.*, 493 U.S. 400, 405 (1990). Whenever "it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud v. American Metal Co.*, 246 U.S. at 309.

As thus defined, the doctrine derives from "[v]arious constitutional and statutory provisions . . . reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 823 n.25. Although the doctrine rests only partly upon " 'constitutional' underpinnings," *id.* at 423, "it is plain that the problems involved are uniquely federal in nature," *id.* at 424, reflecting the view that "rules of international law should not be left to divergent and perhaps parochial state interpretations." *Id.* at 425. Therefore, the issue necessarily "must be treated exclusively as an aspect of federal law." *Id.*

In the instant case, the Florida court not only ignored the unanimous declaration of the Nicaraguan Supreme Court on the precise point at issue, in the precise case at issue; it also ignored the National Assembly's legislative reaction to the Florida court's decision itself, in which the National Assembly interposed its authority to correct the Florida court's mistake. At that point, if not before, the Florida court's adherence to its decision necessarily declared "invalid the official act of a foreign sovereign performed within its own territory," *W.S. Kirkpatrick &*

*Co. v. Environmental Tectonics Corp., Intl.*, 493 U.S. at 405, which is forbidden by the act of state doctrine.

In light of the foregoing, there can be no question of the Florida court's error. Nor, we respectfully submit, can there be any question of the important policies implicated by that error. It would be enough, we submit, to observe that the survivors of 34 decedents who were victimized by the Respondents' wrongdoing not be victimized again by the denial of redress to which they unquestionably are entitled under the laws of their nation. There are, in addition, two important underlying policies of federal constitutional dimension – the principle of comity, and the act of state doctrine. The Republic of Nicaragua entreats this Court to vindicate those policies by accepting review in this case.

## CONCLUSION

It is respectfully submitted that this Court should grant the petition to review the decision of the District Court of Appeal of Florida, Third District.

Respectfully submitted,

DANIEL S. PEARSON
*Counsel of Record for the Republic of Nicaragua*
HOLLAND & KNIGHT
701 Brickell Avenue
Miami, Fla. 33131
(305) 374-8500